

JUDICIAL ELECTIONS: THE CASE FOR ACCOUNTABILITY

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Winston Churchill famously described democracy as the worst form of government—but for all of the others. The same holds true of judicial elections. Their merits are often overlooked when alternatives are discussed. Indeed, the truth is that the alternatives have problems of their own and do not produce better results.

In this essay, I will defend the use of partisan elections as a method of selecting state court judges. I will first briefly describe the debate and its participants. Then, I will discuss the competing values that supporters and opponents of judicial elections advance. I will next address the arguments for and against judicial elections, showing that, while they may not be a perfect method of selecting judges, neither are the alternatives.

At the outset, though, I will briefly describe the ways in which the states currently select their judges. In 1988, Harry Stumpf noted that the variety of selection methods constituted a “rather unclear patchwork” of selection systems.¹ The primary difference has been, and is, between

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1. HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 160 (Harcourt, Brace, Jovanovich 1988); *see also id.*, at 164 (a “hodgepodge” of selection mechanisms”). Complicating matters, in Michigan and Ohio, the political parties nominate candidates for judicial office, but the election is conducted on a nonpartisan basis. *See* Matthew J. Streb, “*The Study of Judicial Elections*,” in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 7 (Streb ed., 2007) [hereinafter *RUNNING FOR JUDGE*].

elective systems (both partisan and nonpartisan) and appointive systems. The so-called Missouri plan is emblematic of the majority of the appointive plans. It calls for a commission to nominate three candidates, one of whom is then selected by the Governor. All of the judges so appointed stand for a retention election that allows voters to choose whether to retain them or not, but does not pit them against another named candidate. For the purposes of this essay, the primary selection methods will be partisan elections, nonpartisan elections, and merit, or Missouri plan, selection by a commission.

I. THE DEBATE

While complaints about judicial elections have been made for some time, the nature of those complaints has changed. Years ago, judicial elections were criticized because they were sleepy contests in which challengers did not appear, voters did not participate, and incumbents did not lose. Now, the opponents complain that the opposite is the case; challengers appear, incumbents sometimes lose, elections are noisy and expensive, and the judiciary is demeaned as a result.

Judicial elections have powerful opponents. They include retired Supreme Court Justice Sandra Day O'Connor, John Grisham, the organized bar, mainstream media, George Soros and his Open Society Institute, and law professors. They believe that issue-oriented political campaigns, with all of their promises, advertising, and fund raising, lead voters to think of judges as politicians, instead of appreciating them as disinterested guardians of the law.² Their proposed solution is the replacement of partisan elections with, at the least, non-partisan elections and, even better, what many call merit selection plans.

The supporters of judicial elections are less well-known. Two of those supporters describe them as “[m]ostly a small handful of social scientists” who “rely primarily on arguments about the value of accountability and . . . recognize the inherently political nature of judicial decision making.”³ For my part, I support partisan judicial elections because I saw how they helped to change the business climate

2. Cf. LEARNED HAND, *THE BILL OF RIGHTS* 73-74 (Harvard Univ. Press 1958) (“For myself, it would be irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”).

3. CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* 2 (2009).

of Alabama for the better between 1994 and the present.⁴ And the court did so by applying well-settled law to the cases before it without improperly favoring business interests.⁵

In addition to races for the Senate, U. S. House of Representatives, governorships and state legislative positions, the 2010 elections included elections for appellate judges in a number of states that gave supporters and opponents of judicial elections the opportunity to make their arguments. The Justice at Stake Campaign, an opponent of judicial elections, published *The New Politics of Judicial Elections 2000-2009: Decade of Change* in which it pointed to a “pronounced and systemic” surge in spending on judicial elections campaigns, particularly by “super spenders.”⁶ In response, the American Justice Partnership published *Justice Hijacked: Your Right to Vote is at Stake*, in which Colleen Pero noted, among other things, the amount of money that George Soros and his Open Society Institute has contributed to groups opposing the election of judges, including the three organizations that published *The New Politics*.⁷ Members of the Federalist Society also published white papers on the Alabama, Texas, North Carolina, Michigan, Illinois, California, and Washington supreme courts.⁸

Results in the elections varied. Three justices on the Iowa Supreme Court who had joined in an opinion striking down an Iowa law that limited civil marriage to a union between a man and a woman, were not retained.⁹ A justice on the Illinois Supreme Court who joined in striking down tort reform legislation as unconstitutional under the state

4. See, e.g., Michael DeBow, *The Road Back from “Tort Hell”: The Alabama Supreme Court, 1994-2004* (2004), available at <http://www.fed-soc.org/publications/detail/the-road-back-from-tort-hell-the-alabama-supreme-court-1994-2004>.

5. See Jack Park, *Alabama Supreme Court: Role of Court in Key Corporate Cases*, (2010) available at <http://www.fed-soc.org/publications>.

6. Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change*, at 1, available at <http://www.justiceatstake.org/resources>.

7. Colleen Pero, *Justice Hijacked: Your Right to Vote is at Stake*, (2010), available at <http://www.americanjusticepartnership.com/hijacked.php>. From a review of the Form 990’s that certain federally tax-exempt organizations file with the IRS, the report calculated that, between 2000 and 2008, the Open Society Institute contributed more than \$2.8 million to Justice at Stake, \$2.225 million to the Brennan Center for Justice, and nearly \$1 million to the National Institute for Money in State Politics. *Id.* at 11.

8. See generally, FEDERALIST SOCIETY, <http://www.fed-soc.org/publications> (last visited April 10, 2011). The views stated in those white papers are those of the authors, not of the Federalist Society.

9. See, e.g., Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REGISTER, Nov. 3, 2010, available at <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices>.

constitution was retained.¹⁰ Voters in Nevada rejected a proposal to adopt a merit selection plan to replace their current system of nonpartisan elections.¹¹ That Nevada initiative included recorded calls with a message from Justice O'Connor, which she said was not authorized, urging voters to vote for the proposed change to merit selection.¹²

II. THE COMPETING VALUES

Supporters and opponents of judicial elections advance different values to support their positions. Supporters invoke accountability, while opponents rely on independence. The parties tend to talk past each other, so it is not only important to understand the competing values and their limitations, but also to try to move beyond them by considering the evidence that supports the arguments made by each side.

The authors of a 2000 Federalist Society white paper supporting judicial elections explain that too much of either accountability or independence is "unattractive."¹³ Judges who are too independent may do whatever they want, and those who are too accountable may follow public opinion polls or political party preferences in their decisions. The authors observe, "Ideally, we want a system that selects judges who combine the virtues of independence and accountability in just the right amounts, but perfection is an unlikely result of our choice of judicial selection mechanism."¹⁴

Accountability means answering for one's actions or inactions. Some suggest that, instead of answering to voters, judges should answer to the law, but the law is not self-enforcing. An appellate court can require a lower court to follow the law, but the Supreme Court and, to a lesser extent, the supreme courts of the states have the final word on constitutional issues. Accordingly, reliance on judges to police their

10. See, e.g., Ann Knief, "Justice Kilbride Prevails in Costly Ill. Retention Election," LEGALNEWSLINE.COM, Nov. 3, 2010, <http://www.legalnewsline.com/news/229640-justice-kilbride-prevails-in-costly-ill.-retention-election>.

11. See, e.g., "Nevada Voters Reject Judicial Ballot Measures," LAS VEGAS SUN, Nov. 3, 2010, available at <http://www.lasvegassun.com/news/2010/nov/03/nv-nevada-measures-2nd-ld-writethru/>.

12. See, e.g., Tony Mauro, "'Robo-Calls' Spark Debate Over Justice O'Connor's Support for Ballot Initiative," LAW.COM, Oct. 28, 2010, <http://www.law.com/jsp/article.jsp?id=1202474019348&rss=newswire&slreturn=1&hblogin=1>.

13. Michael DeBow et al., *The Case for Partisan Judicial Elections*, at 2, (2003) available at <http://www.fed-soc.org/publications>.

14. *Id.*

own fidelity to the law does not provide much in the way of accountability.

Elections are “powerful legitimacy-creating institutions” that “create an inextricable link” between the voters and those they elect.¹⁵ Creating that link between judges and the state’s voters is important. A finding that Stephen Choi, Mitu Gulati, and Eric Posner make supports the notion that judicial elections create a link between judges and the voters. They conclude that appellate judges selected through partisan judicial elections write more opinions than the judges who are appointed to their position, but the appointed judges write opinions that are cited more often.¹⁶ From this, they go on to write that, while elected judges “care about their reputation in the local community of lay voters and politicians,” appointed judges are above that and “care about their reputation among a national community of like-minded professionals.”¹⁷ Put differently, elected judges know for whom they work and who pays their salary. That knowledge can restrain the kind of judicial activism discussed below.

As Judge William Pryor of the Eleventh Circuit Court of Appeals notes, judicial independence was originally understood to mean independence from the other branches of government.¹⁸ The Framers “widely agreed” that the judiciary should be independent of the executive and legislative branches and provided for that independence in Article III of the Constitution.¹⁹ Judge Pryor also explains that the Framers “expected the judiciary to be accountable to the people.”²⁰

Independence was also understood to mean “decisional independence,” which is a judge’s ability to “decide a case fairly based on the facts and the law.”²¹ The Framers protected this lofty role of the federal judges by giving them life tenure and by precluding cuts in their pay in the Constitution.²²

15. BONNEAU & HALL, *supra* note 3 at 17.

16. Stephen Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 290, 309, 315 (2010) [hereinafter *Professionals or Politicians*].

17. *Id.* at 292.

18. William H. Pryor, Jr., *Not-So-Serious Threats to Judicial Independence*, 93 VA. L. REV. 1759, 1764 (2007).

19. *Id.* Judge Pryor points to the provisions of § 1 of Article III, which vest the entirety of the judicial power in the judiciary, provide tenure for federal judges, and guarantee their compensation. *Id.*

20. *Id.* at 1765.

21. *Id.*

22. *Id.*

In the hands of the opponents of judicial elections, though, independence is often invoked to support immunity from public pressure, the ability to make unpopular decisions without fearing negative political consequences. Pitched this way, independence makes a virtue out of a court's rejecting the views of the legislature or the perceived majority view of the community.

Law school classes in constitutional law discuss the "counter-majoritarian difficulty." Rather than being a badge of honor, the judiciary's thwarting of the will of the legislature is a fundamental point of tension. Alexander Bickel explained:

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.²³

The more frequently courts indulge their power to trump the legislative process, the greater the tension. As with steam, the greater the tension, the greater will be the need for an outlet, which elections can provide.

Elections may be "blunt instruments of accountability," but they are also "effective in maintaining popular control over the outer limits of governmental decision-making."²⁴ When courts find the right to same-sex marriage, recover unlimited amounts of noneconomic damages, or to more funding for some school systems, as they have done, those courts push the outer limits of governmental decision-making. Voters do not act inappropriately in voting against appellate judges who act like legislators.

III. THE ARGUMENTS

A. *The Political Cannot Be Depoliticized*

Those who oppose an elected judiciary contend that the alternative merit selection method is less political than elections. There are two problems with this objection. First, judicial selection is a political

23. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 19 (1962).

24. STUMPF, *supra* note 1 (quoting PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 238-39 (1980)); *see also* BONNEAU & HALL, *supra* note 3, at 14 ("Justices who are elected . . . have a strong incentive to consider constituency preferences on those few issues that are publicly salient and politically visible.").

process, no matter how it is done. Second, when state appellate courts behave like legislators, try to solve social problems, or flout the will of the majority, they do political work. And, when they do political work, it is appropriate to hold them politically accountable.

1. Judicial Selection is a Political Process

Federal judicial selection is tantamount to anointment, but politics plays a major role. Candidates for a federal judicial position resemble nothing so much as a group of people running around in a thunderstorm each holding up an umbrella hoping that he or she will be the one struck by lightning. Those candidates must be of the right political party and obtain the approval of State Senators to be nominated. The nominees must also appear before the Senate Judiciary Committee to defend their qualifications, and, if they are lucky, their nomination is debated on the floor of the Senate. Nominations like those of Robert Bork and Justice Clarence Thomas, among others, evidence that the federal process involves a big dose of politics.

Political considerations do not disappear when merit selection plans are used; those considerations just move behind the closed door of the selection process. There, the members of the merit selection commissions have to curry favor with the various factions of the bar.²⁵ For example, lawyers control 16 of the 17 seats on the commission that is responsible for selecting appellate judges in Maryland and 15 of the 17 seats on Tennessee's Judicial Nominating Commission, even though that state legislature cut the number of lawyer seats to 10 in 2009.²⁶ Elsewhere, lawyers are generally well represented. Nobody should be surprised if they tend to favor the candidates they deem most likely to "protect[] and expand[] the domain of law and lawyers and thus raise[] lawyers' incomes and influence."²⁷

Moreover, the appointment process is not free from the influence of politics. When Republican Governor Chris Christie of New Jersey decided not to re-appoint Justice John Wallace to the New Jersey

25. See Bryan T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009); Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009).

26. Pero, *supra* note 7, at 13.

27. Michael DeBow, *The Bench, The Bar, and Everyone Else: Some Questions About State Judicial Selection*, 74 MO. L. REV. 777, 779. See also *id.* at 779 n.10 (quoting F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and State Campaigns for the Merit Plan*, 110 PUB. CHOICE 79, 80 (2002)) ("One economic study of lawyer support for merit selection found that 'the merit plan is associated with between eighteen and thirty-two percent more filings in state supreme courts over the period 1985 through 1994.'").

Supreme Court, he said that his action was not a reflection on Wallace, but, rather, on the court, which had a “history of using legal precedent to set social and tax policies—a role which belongs squarely with the Legislative and Executive branches of state government.”²⁸ Governor Christie nominated Anne Patterson instead, but the Democratic President of the New Jersey Senate declined to hold hearings on the nomination.²⁹

In Missouri, after Missouri Supreme Court Justice Ronnie White retired, Governor Matt Blunt, who campaigned against a runaway judiciary, criticized the judicial nominating commission process and the candidates they submitted. Instead of respecting the fact that Governor Blunt had been elected with a majority of the votes, the panel sent him “three well-credentialed, business-as-usual, ‘there is no problem with the Supreme Court of Missouri’ candidates.”³⁰ Some suggested that Governor Blunt reject all three candidates, but, under the Missouri procedure, that would have left the decision to the commission.³¹ Governor Blunt held his nose and appointed one of the candidates.³²

Finally, with respect to the “officially nonpartisan” judicial election for a seat on the Wisconsin Supreme Court in 2008, “progressives” and the teachers union supported Louis Butler, the incumbent who was defeated, while business and law enforcement interests supported the challenger, Michael Gableman.³³ Something similar apparently happened in the race between David Prosser and JoAnne Kloppenburg.³⁴ The nonpartisan label, thus, has not blinded the interests or the voters.

28. See Press Release, Governor Chris Christie, Governor Chris Christie Announces Appointment to the New Jersey Supreme Court (May 3, 2010).

29. See generally Kevin Mooney, *Supreme Confidence*, THE AMERICAN SPECTATOR (Feb. 15, 2011), available at <http://www.spectator.org>.

30. Clifford W. Taylor, *Without Merit: Why “Merit” Selection Is the Wrong Way for States to Choose Judges*, at 4 (Oct. 6, 2010), available at <http://www.heritage.org>.

31. *Id.*

32. See *id.* As Taylor noted, Governor Blount was “the only person in the process who had any claim to having presented his ideas on who should serve as justices to the people of Missouri . . . was blocked in a transparently political move that compelled his selection of the least disagreeable candidate. *Id.*

33. See, e.g., Patrick Marley & Stacy Foster, *Gableman victorious: Challenger Beats Butler in High Court Race; 1st Such Ouster Since ‘67*, WISCONSIN JOURNAL-SENTINEL (Apr. 2, 2008), available at <http://www.jsonline.com/news/wisconsin/29406414.html>. President Obama has nominated Butler for a federal district court judgeship. See Jack Park, *Look Out for “Loophole Louie”*, Dec. 3, 2009, <http://www.humanevents.com/article.php?id=34653>.

34. See, e.g., Robert Costa, *Dem Rep: Prosser Equals Walker, Prosser Equals Koch*, NATIONAL REVIEW, Apr. 3, 2011, available at <http://www.nationalreview.com/corner/263750/dem-rep-prosser-equals-walker-prosser-equals-koch-robert-costa>.

2. The Decisions of State Supreme Courts Have Political Consequences

Is it wrong to seek to hold judges accountable? Some of those opposed to judicial elections reason that judges are not like legislators because they do not make political decisions. That argument fails because judges make decisions that have important political and public policy consequences. State courts have interpreted their state constitutions to mandate the recognition of same-sex marriage.³⁵ Other judicial rulings have overturned legislative tort reform measures such as laws capping the recovery of noneconomic damages on the ground that they violated state constitutions.³⁶

Rulings like these raise important questions regarding the proper role of the judiciary and judicial philosophy. Lawsuits challenging the constitutionality of state systems of financing public education, for example, constitute “a quintessential example of judicial activism—the least accountable branch of state government overrules the highly visible public policies set by state and local legislative bodies, and uses relatively novel legal precedent.”³⁷ The ruling in New Jersey that mandated a new system of financing public education, for example, was based on a provision calling for a “thorough and efficient” system of public education.³⁸ Such rulings produce judicial second-guessing of the legislature’s efforts to comply with the court’s ruling; what the legislature provides rarely satisfies the prevailing plaintiffs.³⁹ The result is unsightly fights between the legislature, which has the responsibility

35. See, e.g., *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009); *Kerrigan v. Commissioner of Public Health*, 957 A. 2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Mass. 2003). Michael DeBow observes, “Litigation over same-sex marriage, typically centered on the equal protection provisions of state constitutions, is probably the most visible example of this phenomenon [i.e., the “counter-majoritarian difficulty”] at the present time.” DeBow, *supra* note 27, at 780 n.12.

36. See, e.g., *American Oculoplastic Surgery v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (statutory cap on noneconomic damages in medical malpractice cases violates State constitution’s right to trial by jury); *Lebron v. Gottlieb Memorial Hospital*, 930 N.E.2d 895 (Ill. 2010); *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997) (statutory cap on noneconomic damages violates state constitutional bar on special legislation and separation of powers provision); *Wright v. Central DuPage Hospital Assn.*, 347 N.E.2d 736 (Ill. 1976).

37. Karen Swenson, *School Finance Reform Litigation: Why Are Some State Courts Activist and Others Are Restrained?*, 63 ALB. L. REV. 1147, 1149-50 (2000).

38. See N.J. Const. art. VIII, §4.

39. See, e.g., *Campaign for Fiscal Equity, Inc. v. New York*, 861 N.E.2d 50 (N.Y. 2006) (rejecting contention of New York City that additional \$1.93 billion in funding is insufficient; New York City sought an additional \$5.53 billion).

to allocate funding to all state functions, and the judiciary, which has mandated additional funding for public education.

The Connecticut Supreme Court's decision in *Kerrigan v. Commissioner of Public Health*⁴⁰ isolates an important question of judicial philosophy. In holding that a Connecticut civil union law that defined marriage as the union between one man and one woman discriminated on the basis of sexual orientation, the court gave voice to the living constitution rationale. The court wrote that the state's constitution "was meant to be, and is, a living document with current effectiveness . . . [i]t is an instrument of progress . . . and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens."⁴¹ As for marriage, the court stated that "our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection."⁴²

If the drafters of the Connecticut Constitution had same-sex marriage in mind when they did their work, the court would not have had to invoke the "living constitution" in all its glory. The court had to find that right somewhere other than in the law. The court also had to bypass the amendment process in the state constitution, taking on itself the burden of making the state "yield to a more contemporary appreciation of the rights entitled to constitutional protection."⁴³ As Robert Bork has warned, when a court "decides it is the instrument of the general will and keeper of the [public] conscience," there is no longer any law, just "the moral imperatives and self-righteousness of the hour."⁴⁴

The Iowa Supreme Court's 2009 ruling in *Varnum v. Brien*, holding that a state statute limiting civil marriage to a union between a man and a woman violates the equal protection clause of the Iowa Constitution, raised similarly important questions of judicial philosophy.⁴⁵ As with the Connecticut Constitution, the drafters of the 1858 Iowa Constitution did not have same-sex marriage in mind when they drafted that clause. The voters of Iowa had a remedy, however, in retention elections, and they used it to remove the three justices who were up for retention.⁴⁶

40. 957 A.2d 407 (Conn. 2008).

41. *Id.* at 420-21 (citations omitted).

42. *Id.* at 482.

43. *Id.*

44. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 132 (1990).

45. 763 N.W.2d 862 (Iowa 2009).

46. See Schulte, *supra* note 9.

Separate and apart from decisions with important political consequences, the state courts have an effect on the state's business climate. The Alabama Supreme Court of the late 1980's and early 1990's was identified in the minds of many with a litigation climate that was hostile to corporate defendants. One example is the court's decision in *BMW of North America v. Gore*,⁴⁷ in which the court ordered BMW to pay punitive damages of \$2 million because the company touched up the paint job on the vehicle it sold without disclosing the repair, a punitive to compensatory damages ratio of 500-1. In another decision, the court struck down a statutory cap on punitive damages on the ground that the cap violated the state constitution's guarantee of a right to a jury trial.⁴⁸ The court also adopted a plaintiff-friendly "justifiable reliance" standard for fraud actions and applied it to both consumer and commercial transactions.⁴⁹ The combination of the relaxed standard for proving reliance in fraud cases and the absence of a cap on punitive damages contributed to the state's reputation as a "tort hell."

Elections helped to change that court, and Alabama has reaped the benefit of that change. The declaration by Republican candidates that they saw that the role of the judiciary is to say what the law is, not what it ought to be, resonated with the voters. In subsequent elections, Democratic candidates made the same declaration, but the Republican incumbents have proven trustworthy. Since the change in the court's personnel, multinational businesses like Mercedes, Honda, Hyundai, and Thyssen-Krupp have built plants in the state, providing employment opportunities to many residents.

47. 646 So.2d 619 (Ala. 1994), *rev'd* 116 S. Ct. 1589 (1996).

48. *Henderson v. Ala. Power Co.*, 627 So.2d 878 (Ala. 1993).

49. *Johnson v. State Farm Ins. Co.*, 587 So.2d 974, 979 (Ala. 1991). In 1997, the court observed that the adoption of the justifiable reliance standard had been a mistake and returned to the reasonable reliance standard that had previously been in use. See *Foremost Ins. v. Parham*, 693 So.2d 409 (Ala. 1997). Significantly, Justice Shores agreed with the decision to return to the reasonable reliance standard. She wrote, "In my opinion, this Court made a mistake in departing from a standard in fraud cases that had worked well. As a member of the majority that made that departure, I am willing to admit that the rule should not have been changed." *Id.* at 437 (Shores, J., concurring specially).

The difference between the two standards can be seen in a common scenario from that time period. The purchaser of a mobile home claims that he was defrauded by the seller's agent who told him something that was inconsistent with the plain terms of the written contract the plaintiff signed. Under the justifiable reliance standard, the buyer might claim that he relied on what he was told and might reach the jury on that claim. Under the reasonable reliance standard, the plain terms of the contract would be more likely to control.

B. *The Practice of Judicial Elections*

The opponents of judicial elections complain that elections demean the judiciary because the need to raise campaign funds, the related advertising, and the campaigning put the judiciary in a bad light. Critics view voters as uninterested and question the qualifications of candidates. In this portion of the essay, I will address those complaints.

1. Money

Any focus on spending in judicial election campaigns needs to be put in perspective. A good place to start is here: “[M]oney is a necessary but insufficient condition for electoral success,”⁵⁰ and electoral success is what candidates are after. In addition, by comparison to other spending, spending on political campaigns is not significant. As George Will noted last October, the anticipated total spending by all parties, campaigns, and issue-advocacy groups on all political offices in the two-year cycle between 2008 and 2010 was expected to be \$4.2 billion, less than what Procter & Gamble spent on advertising in one year (\$8.6 billion) and less than what Americans spend on potato chips in a year (\$7.1 billion).⁵¹ Appointive systems are not free of spending. Approximately \$3.7 million was spent to influence the confirmations of Chief Justice John Roberts and Associate Justice Samuel Alito for their Supreme Court positions.⁵² Given those figures, it is difficult to say that too much is spent on any one race.

In addition, judicial campaigns are typically down-ticket races. They typically appear on the ballot below races for Congress, Governor, and other statewide officials. Candidates must spend money in order to generate name recognition and encourage voters to look beyond those higher-profile races. Bonneau and Hall observe that candidates for state supreme court positions cannot generate “free” publicity like candidates for other offices can.⁵³ For example, many incumbent officials issue press releases, and members of Congress have the benefit of the franking privilege.

50. BONNEAU & HALL, *supra* note 3, at 76.

51. George Will, *Return of the Scold War*, THE WASH. POST, Oct. 17, 2010, at A21. Will also noted that the \$4.2 billion expectation was about what Americans spend on yogurt in a year, but less than what they spend on Halloween candy in two years. *Id.*

52. Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE*, *supra* note 1, at 90.

53. BONNEAU & HALL, *supra* note 3 at 77.

In this connection, it is important to note the role that political parties play. Bonneau and Hall note that political parties are “powerful organizational actor[s]” which have experience in raising funds and running campaigns.⁵⁴ Voters can also rely on the party’s imprimatur. Baum and Klein suggest that, when voters rely on the party’s imprimatur, they may not be basing their voting decision on information about the candidate’s performance, with the result that accountability is blurred.⁵⁵ That suggestion is problematic given that there is good reason to believe that Democrat lawyers think differently from Republican lawyers. Moreover, the candidate who has won a primary election has not only earned the right to the imprimatur, but also has been vetted to a degree by the party and the voters.

The Justice at Stake Campaign sounds the alarm about the amount of spending in judicial campaigns and the fact that much of it is done by “super spenders.”⁵⁶ Bonneau and Hall make some findings that put the alarm in its place. From their review of elections between 1990 and 2004, they conclude that nonpartisan elections “significantly raise the costs of seeking office,” and that incumbents tend to outspend challengers.⁵⁷ The alarm also fails to reflect some of the reasons for spending. Justice at Stake points at the 2008 Alabama race between Greg Shaw, a judge of the Alabama Court of Criminal Appeals, and Deborah Bell Paseur, a state court trial judge. However, that race involved an open seat on the Alabama Supreme Court, which was the only seat up for election in 2008.⁵⁸ By failing to consider the context for spending, Justice at Stake overstates its case.

2. Voter Knowledge

The contention that voters lack interest in judicial elections and knowledge sufficient to judge the qualifications of the candidates has problems as well. At the outset, it smacks of elitism, in that voters are deemed competent to vote for other elected officials, but not for judges.

54. *Id.* at 60.

55. Laurence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE*, *supra* note 1, at 142.

56. Sample et al., *supra* note 6.

57. BONNEAU & HALL, *supra* note 3, at 49, 71.

58. See, e.g., *Greg Shaw Narrowly Wins Alabama Supreme Court Post*, THE BIRMINGHAM NEWS (Nov. 5, 2008, 9:21 AM), http://blog.al.com/spotnews/2008/11/greg_shaw_narrowly_wins_alabam.html. See also Eric Velasco, *Spending Down in Alabama Supreme Court race*, THE BIRMINGHAM NEWS (Feb. 1, 2011, 8:00 AM) http://blog.al.com/spotnews/2011/02/spending_down_in_alabama_supre.html (noting that spending for those same seats in 2004 was \$7.7 million, but only \$4.3 million in 2010).

As former Chief Justice of the Michigan Supreme Court Cliff Taylor puts it, the notion that as “well-intentioned as [voters] are, they are just unable to evaluate judges because judges’ work is very sophisticated and common folks don’t have the learning to appreciate it” sounds “plausible,” but it does not bear up when examined closely.⁵⁹

One way of measuring voter interest is by looking at the phenomenon of roll-off in elections. Some voters vote only for the offices they consider to be the most important and do not vote in the other races on the ballot. For example, in presidential election years, many voters vote only for a presidential candidate and ignore the other races. As Bonneau and Hall put it, “Presidential elections encourage ‘casual’ voters to participate, and these people are not likely to vote for ‘insignificant’ races, such as state supreme court.”⁶⁰ When they looked at ballot roll-off in state supreme court elections between 1990 and 2004, Bonneau and Hall found that “higher amounts of campaign spending produce significantly lower levels of roll-off.”⁶¹ Baum and Klein found the same thing when they looked at voter participation in the 1998 and 2002 elections in Ohio, both of which included state supreme court positions on the ballot.⁶²

Bonneau and Hall also see voters and candidates as rational actors. Candidates act rationally: “Challengers go after incumbents who are the most electorally vulnerable, either because they hold marginal seats or because they suffer an attenuated incumbency advantage by virtue of never having been elected.”⁶³ Incumbents are electorally vulnerable when they win by a small margin in their last election or when they are appointed to fill a vacancy. The latter enjoy the benefit of incumbency without having been elected and lack campaign experience. We should not be surprised when candidates decide to challenge vulnerable incumbents and spend money to educate voters.

59. Taylor, *supra* note 30, at 2.

60. BONNEAU & HALL, *supra* note 3, at 44.

61. *Id.*

62. Baum & Klein, *supra* note 55, at 150 (“The enormous difference in the volume of information from the campaigns and the news media had a very substantial effect on voters’ participation in the [2002] supreme court races.”).

63. BONNEAU & HALL, *supra* note 3, at 96; *see also id.* (“[T]he likelihood of challengers entering state supreme court elections is predictable and reflects, at least to some extent, strategic thinking about the probability of winning.”).

3. Quality of Candidates and Judges

The evidence does not support the contention that merit selection mechanisms produce better judges. At least two studies show that appellate judges tend to have comparable qualifications without regard for the way in which they were selected.⁶⁴ Bonneau and Hall also conclude that voters can distinguish among candidates by their qualifications, favoring challengers with judicial experience over those without it.⁶⁵ In other words, voters tend to like candidates whose first name is “Judge.”

Other scholars have found that “[e]lected judges write more opinions”⁶⁶ than appointed judges and that even though the opinions of appointed judges are cited more frequently, “the evidence suggests that the large quantity difference makes up for the small quality difference.”⁶⁷ This suggests that voters may view productivity as one measure of judicial competence.⁶⁸ Voters may also view productivity as a sign that the judge is doing his or her job. In the 2010 elections in Alabama, Associate Justice Tom Parker had to respond to suggestions that he was significantly behind in his work.⁶⁹ Finally, as noted above, the difference may reflect who the judge thinks he or she works for. Elected judges think they work for the voters, while appointed, merit-selection judges look for the respect of the larger legal community.

4. The Alternatives Revisited

Opponents of elections contend that merit selection plans and retention elections are preferable to partisan elections for a variety of

64. See Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, in JUDICATURE 228-35 (Dec.-Jan. 1987); BONNEAU & HALL, *supra* note 3, at 136 (“[D]iversity on the bench is not affected by the particular methods of for staffing the bench.”) (citing Mark S. Hurwitz and Drew Lanier Noble, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on Supreme Courts and Appellate Courts*, 3 STATE POLITICS AND POLICY QUARTERLY 329-352 (2003)).

65. BONNEAU & HALL, *supra* note 3, at 101 (“[T]he electorate not only responds to basic differences between challengers, but also appears to differentiate between types of judicial experience” and “the electorate takes into account judicial experience when selecting among candidates.”).

66. Choi et al., *supra* note 16, at 290.

67. *Id.*

68. *Id.* at 312.

69. See, e.g., Chris Anthony, *Parsons: Tom Parker is the Least Productive Justice*, OPELIKA-AUBURN NEWS, Available at http://bamafactcheck.com/view/full_story_opelika/9756080/article-Parsons--Tom-Parker-is-the-least-productive-justice-on-the-Alabama-Supreme-Court-Truth-Rating--5-out-of-5-?instance=special; see also Choi et al., *supra* note 16, at 312.

reasons. Without conceding that the opponents are correct, the political implications of merit selection should be closely examined.

Michael DeBow notes that ideology and the self-interest of lawyers are good reasons to be concerned about the extent of lawyer influence on the nominating commissions in non-election states.⁷⁰ With respect to ideology, Brian Fitzpatrick collected data on the appellate court nominees in Tennessee and Missouri, both so-called merit selection states. He determined that, in Tennessee, 67% of the nominees voted more often in Democratic primaries and 33% voted more often in Republican primaries.⁷¹ As for Missouri, Fitzpatrick's conclusions are striking:

Of the fifty-four nominees in Missouri since 1995 who made any campaign contributions, 87% gave more to Democrats than Republicans, and only 13% gave more to Republicans than Democrats. Over the same time period, Democratic candidates in Missouri only received roughly 50% of the general election votes in state and federal House races. . . . It should be noted that the disparity in the *amount* of money these nominees contributed is even more stark than the disparity in the number of nominees who contributed: nearly 93% (\$316,010) of all of the money contributed went to Democratic candidates, whereas only 7% (\$24, 615) went to Republicans.⁷²

Those results correlate with the general belief that, as a group, lawyers "are, on average, more liberal (in the contemporary political sense—i.e., associated more closely with policy positions held by the Democratic Party) than are members of the general public."⁷³ As for their self-interest, DeBow observes that, as a group, lawyers "have an obvious personal interest in the level of lawyer incomes, which in turn is a function of the importance of law in American society."⁷⁴ We should not be surprised if the interests of lawyers are reflected in the recommendations that lawyer members of nominating commissions make. This is even more the case if, as Cliff Taylor points out, all of the applicants will have good records. In that light,

70. DeBow, *The Bench, the Bar, and Everyone Else*, *supra* note 27, at 778.

71. Brian Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675, 693 (reviewing voting records for 88 of 90 nominees).

72. *Id.* at 696-97 (emphasis added) (finding 54 of 108 nominees to have made political contributions).

73. *Id.* at 676.

74. DeBow, *supra* note 27, at 779.

it quickly becomes clear that it is reckless to say that because one applicant, many years ago, had a 3.5 GPA and another a 3.6 GPA at different law schools, or that, later in life, one was a Boy Scout leader and the other a food bank volunteer, one is “merit qualified” and the other isn’t.⁷⁵

Merit selection will inevitably boil down to consideration of something other than “merit.”

IV. CONCLUSION

At twenty year intervals, merit selection has been reviewed and found wanting. In 1969, Richard Watson and Ronald Downing published a comprehensive study of the origins and operation of the Missouri Plan. They found that the lawyer members of the nominating commissions tended to look at candidates in the light of their practices and clients. The effect was to replace electoral politics with a “somewhat subterranean process of bar and bench politics, in which there is little popular control.”⁷⁶ Some twenty years later, Harry Stumpf wrote, “If the lay, the professional, and even the political inputs built into the Missouri Plan do not work as advertised, and if the plan in general cannot be shown to produce superior judges, what is left of the argument? The answer is, not much.”⁷⁷ In 2007, Bonneau and Hall reviewed the results of state court judicial elections from 1990-2004 and considered the objections to judicial elections in the light of that review. Once again, Bonneau and Hall found that merit selection did not prove better in practice than judicial elections.

No system of judicial selection is perfect, but elections provide a means of holding judges accountable when they push the outer limits of governmental decision-making. We can use lawyers to select our judges, or we can let the voters do it. For me, I’ll take the voters.⁷⁸

75. Taylor, *supra* note 30 at 3.

76. *See id.* at 3-4; *see also* STUMPF, *supra* note 1, at 167.

77. STUMPF, *supra* note 1, at 171.

78. Cf. Matthew J. Streb & Brian Frederick, *Judicial Reform and the Future of Judicial Elections*, in *RUNNING FOR JUDGE*, *supra* note 1, at 205-06 (noting “deep voter suspicion” of attempts to have them surrender their right to vote for judges).